UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

STEINGASS MECHANICAL CONTRACTING, INC.

Employer

and **Case No. 8-RC-16293**

PLUMBERS AND PIPEFITTERS, LOCAL 219
A/W UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA

Petitioner

DECISION AND DIRECTION OF SECOND ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act,[1] as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[2]

---

[1] The Petition was filed on November 7, 2001. Processing of the Petition was blocked for a substantial period of time by numerous unfair labor practice charges filed against the Employer.

Ultimately, the Petition was unblocked and, pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 8 on July 21, 2003, an election by secret ballot was conducted on August 4, 2003, among employees in the unit described, infra. The Tally of Ballots prepared on August 4, 2003 shows that of approximately 54 eligible voters, 43 cast ballots of which 4 were cast for, and 39 against, the Petitioner. There were 31 challenged ballots, a number insufficient to affect the results of the election.

On August 7, 2003, the Petitioner filed timely objections to conduct affecting the results of the election. Certain of the Petitioner's objections were consolidated for hearing with Case No. 8-CA-34252.

By Order dated December 31, 2003, the cases were severed, the Regional Director for Region 8 approved the withdrawal of the charge in Case No. 8-CA-34252 based upon a non-Board settlement of the allegations contained therein. The Employer agreed that the election should be set aside and a new election conducted, and a hearing was ordered with respect to Case No. 8-RC-16293 because the parties were unable to agree to the terms of a Stipulated Election Agreement regarding the second election.

[2] The Parties filed post-hearing briefs, which have been carefully considered. Upon the entire record in this proceeding, the undersigned finds: the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein; the labor organization involved claims to represent certain

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> ***All full-time and regular part-time employees performing the work of plumbers, plumbers' helpers, plumbers' apprentices, pipefitters, pipefitters' helpers, pipefitters' apprentices, sprinklerfitters, sprinklerfitters' helpers, insulators, insulators' helpers, cement finishers, operators, carpenters, CDL truck drivers, non-CDL truck drivers/couriers, refrigeration technicians, HVAC technicians, electrical control technicians, laborers, utility line workers, HVAC helpers, and caulkers from the Employer's facility located at 754 Progress Drive, Medina, Ohio, the sole facility involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.***

There are approximately 57 employees in the unit found to be appropriate.

INTRODUCTION

The Employer is a construction contractor engaged in the industrial and commercial service and installation of plumbing, HVAC and fire suppression systems from its facility in Medina, Ohio. There is no history of collective bargaining regarding employees in the unit sought.

The parties stipulated that the above-described unit is appropriate for collective bargaining purposes. The Parties disagree over the eligibility of certain individuals to vote in the election directed herein.

Positions of the Parties

The Petitioner contends that individuals who worked for the Employer on a Wal-Mart construction project in Steubenville, Ohio are eligible to vote in the election pursuant to the **Steiny-Daniel** formula. All of the individuals at issue are members of Plumbers and Pipefitters

---

employees of the Employer. A question affecting commerce exists concerning the representation of certain

Local 495 which has geographic jurisdiction over the Steubenville area. The Employer disagrees and contends that the individuals have no reasonable expectancy of recall and are, therefore, not eligible to vote.

In addition, the Petitioner asserts that employees Shawn Werner, Tim Werner, Nathaniel Haigh, Gregory Mann and Henry Speith have a special or familial relationship to the owners of the Employer, share no community of interest with unit employees and should not be entitled to vote. The Employer contends that the named individuals hold unit positions, share a community of interest with other unit employees and should be eligible to vote in the election directed herein.

The Petitioner also contends that David Liggett is a managerial, confidential and/or supervisory employee and should not be eligible to vote in the election. The Employer contends Liggett is a unit member and should be found eligible to vote.

Finally, the Petitioner maintains that the payroll period for eligibility to vote in this second election should be the date used for the original election. The Employer argues that the eligibility date should correspond to the normal eligibility date of a re-run election, which is the payroll period ending date immediately preceding the direction of the second election.

Summary of Conclusions

I find that: employees who worked solely on the Wal-Mart job in Steubenville, Ohio have no reasonable expectancy of recall and are not eligible to vote in the election directed herein; Shawn Werner, Tim Werner, Greg Mann and Henry Speith share a sufficient community of interest with unit employees to be eligible to vote in the election; Nathaniel Haigh is excluded from the unit; David Liggett is not a staturtory supervisor, managerial or confidential employee

---

employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

and thus is eligible to vote in the election; and the eligibility date for this second election is the payroll period ending date immediately preceding this Decision.[3]

FACTS AND ANALYSIS

The Employer's office is in Medina, Ohio but most of its work is performed on construction sites in various locations. William Steingass is the Employer's president and owns 50% of the company. William Lesure is the vice-president of contracting and Rick Mann is the Employer's vice-president of service. Lesure and Mann each own 25% of the company.

The Steubenville Employees

Work at the Wal-Mart site in Steubenville, Ohio began in July 2002 and ended in March 2003. Steubenville is within the geographic jurisdiction of Plumbers & Pipefitters Local 495. The Employer entered into a "project only" agreement with Local 495 in 2002. The agreement terminated upon completion of the Wal-Mart job. The mutual agreement of the parties was required in order to extend the contract to other projects.

The Employer assigned few of its regular employees to the Steubenville project, hiring a number of Local 495 members for the project. [4] The voting eligibility of the Local 495 members

[3] The charge in Case No. 8-CA-34774 alleges that the Employer unlawfully failed to reinstate seven unfair labor practice strikers after receiving their unconditional offer to return to work. The alleged discriminatees in that case are: Dave Holbert; John Mudway; Chris Boggs; Rich Hill; Dan Evans; Marshall Martz; and Terry Palmer. As noted on the record herein, the eligibility of those employees to vote in this election will be determined by the outcome of the unfair labor practice charge. In the event that the decision in the unfair labor practice charge is not final by the time this election is conducted, the seven alleged discriminatees may vote subject to challenge.

[4] The individuals at issue are:

Harry Barton	Mark Leput
John Blanton	Robert Liggett
Mike Busana	Rick O'Brien
Andy Busatti	James Olmstead
Sam Busic	Vic Porreca
Dave Clark	John Rayburn
Josh Cline	Anthony Rotellini
Terry Costlow	Dana Saltsman
John Criss	Mark Vikelic
Eric Crouse	Rocky Zinno
Jeff Gampolo	

is at issue in this proceeding.

Business Manager Robert Haugh, of Local 495, testified that once the Wal-Mart project was complete, the Employer had no further obligation to the Union. Haugh testified that the Employer did not bid on any other projects within the geographic jurisdiction of Local 495 during or after the Wal-Mart job. According to Haugh, union members were laid off at various times throughout the project. While Haugh testified that no one told him that the layoffs were permanent, the laid off employees were placed on Local 495's out of work list. Haugh acknowledged that the Employer was not obligated to recall any of the laid off employees unless it signed a new agreement.[5] Finally, Haugh testified that none of the Local 495 members at issue herein worked for this Employer after the Wal-Mart job was completed.

Lesure testified that the Wal-Mart project was the only one the Employer performed within the geographic jurisdiction of Local 495. Lesure's uncontroverted testimony establishes that the Employer has no present plans to bid on work in that area again. According to Lesure, the job site was two hours away from the Employer's Medina facility, its managerial staff is insufficient to perform work that far away, and the Wal-Mart job required him to spend too much time away from the office. Lesure testified that in his 27 years with this Employer, he could count the number of jobs located more than two hours from the shop on one hand.[6]

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time it is appropriate in this case to apply the formula in **Daniel Construction Co., 133 NLRB 264 (1961) and Steiny & Co., 308 NLRB**

---

[5] Haugh testified that union members do travel outside Local 495's jurisdiction to work. Under such an arrangement, Local 495 members could travel to Cleveland, Ohio to seek employment through other unions. Haugh acknowledged, however, that the travelers would not be referred to this Employer for work since it is not signatory to a contract with any local union.

[6] Haugh testified that he faxed the Employer a bid sheet on a job in Zanesville but Lesure told him the job was too far from the shop.

1323 (1992).

The **Steiny-Daniel** formula provides that, in addition to the normal eligibility requirements, unit employees are eligible to vote if they have been employed by the employer for 30 days or more within the 12 months preceding the eligibility date for the election, or, if they have had some employment in those 12 months, and have been employed for 45 days or more within the 24 month period immediately preceding the eligibility date.

The Petitioner contends that those Steubenville employees who meet the requirements of the **Steiny-Daniel** formula are eligible to vote, without further analysis. The Petitioner further contends that if, however, reasonable expectancy of recall is a factor, the Steubenville employees also meet that criterion and are eligible to vote. The Petitioner argues that the Employer has bid on work projects located more than one hour from its shop and that the Employer did not inform Local 495 that it would never bid on work in the Steubenville area again. Since, according to the Petitioner, Local 495 members were not told that the lay off was permanent and the Employer never voiced complaints about the work of Local 495 members, employees have reason to believe that they would work for this Employer again.

The Employer asserts that the employees in dispute must satisfy the **Steiny-Daniel** formula and have a reasonable expectancy of recall in order to be eligible to vote in this election. The Employer takes the position that record evidence demonstrates that the Steubenville employees have no reasonable expectancy of recall and are thus ineligible.

In **Steiny and Company, Inc., 308 NLRB 1323 (1992)**, the Board noted that the **Daniel** formula simply enfranchises employees who, although working on an intermittent basis, have sufficient interest in the employer's terms and conditions of employment to warrant being eligible to vote and included in the unit. In my view, **Steiny** should not be applied mechanically

to allow all employees who may fit within its formula to be eligible to vote.

When there is specific evidence raising the issue of the expectancy of recall of employees who may be eligible under the **Steiny-Daniel** formula, I believe such evidence must be considered.

In **CAB Associates, 340 NLRB No. 171 (12/31/03)**, the Board considered the issue of whether a construction industry employer's withdrawal of recognition was justified because it contended that it had a "stable-zero" employee unit. In deciding that issue, the Board noted that in work involving a normal, fluctuating demand for employees, like the construction industry, the work force includes employees who are actively working as well as those who have a reasonable expectancy of recall even though they are on lay off status at the time of the election. **Finger Lakes Plumbing & Heating Co., Inc., 253 NLRB 406, 410 (1980)**.

In **CAB**, the Board concluded the laid off employees involved had a reasonable expectancy of recall based upon the employer's past experience and future plans, the circumstances surrounding the layoff, and what employees were told about the likelihood of recall. **Id. at sl. op. p. 15**.

In **Laneco Construction Systems, Inc., 339 NLRB No. 132 (2003)** an employer in the construction industry challenged the ballots of seven employees whom it claimed were permanently laid off prior to the election. The Board noted that the employer bears the burden of establishing that the employees had no reasonable expectancy of recall as of the date of the election by establishing objective factors including the employer's past experience, its future plans, and the circumstances of the lay off including what employees were told as to the likelihood of recall. In **Laneco**, although the employer presented testimony that it had no prospects for additional work in the area at the time of the layoff, it acknowledged that it had bid

on a new project in the area which would have provided more work for laid off employees. Indeed, the evidence established that the employer's foreman told laid off employees that when the next phase of the job opened, there would be an opportunity for more work. The Board noted that no evidence was presented to establish that the current lack of area work was the result of a fundamental change or shift in the employer's business. Accordingly, the Board found the seven employees to be eligible under the above-noted standards.

Based on the evidence, the law and the record as a whole, I conclude that the Steubenville employees have no reasonable expectancy of recall and are not eligible to vote in this election. The job ended almost one year ago; the Employer has not bid on or performed any work in that area since that time, there is no evidence that any of the employees at issue ever sought work with the Employer after the completion of the Steubenville job, and the work was performed pursuant to a "project only" agreement. The Petitioner has been unable to demonstrate that the employees at issue have a sufficient continuing interest in the terms and conditions of employment of unit employees to be eligible to vote.

Relatives of Management

The Petitioner contends that Shawn Werner, Tim Werner, Nathaniel Haigh, Gregory Mann and Henry Speith are ineligible to vote in the election because they have a special status or family relationship with the Employer's owners. The Employer argues that they are eligible to vote because they perform unit work, are not afforded any special status and share a community of interest with other unit employees.

As noted, William Lesure has worked for the Employer for 28 years and serves as the vice president of contracting. He owns 25% of the Employer. That ownership interest began in the last three years. Tim and Shawn Werner are Lesure's stepsons. They do not reside with him

and he does not provide them with any financial support. Nathaniel Haigh is also Lesure's stepson. Haigh lives in Lesure's home and pays Lesure's wife rent.

Lesure, William Steingass and Kevin Cuslik are the Employers' project managers and decide which employees are assigned to particular jobs. There are times when Tim, Shawn and/or Nathaniel work on jobs supervised by Lesure.

Shawn Werner is 24 years old. He is a plumber earning between $24 and $25 an hour. Lesure testified that plumbers earn between $10 and $30 per hour but that the majority of plumbers receive $24 per hour if they have the requisite knowledge. There are approximately 15 plumbers currently employed and, according to Lesure, seven earn more than Shawn, who has worked for the Employer for six years. He currently has his own home and has not resided with Lesure for six years.

Tim Werner is 27 years old and works as a sprinkler fitter/group leader. He earns between $28 and $29 per hour. According to Lesure, employees in that job classification earn between $18 and $30 per hour. Lesure conceded that few employees earn $28 to $29 but contends that Tim is the best in his field and is likely the highest in seniority. Lesure testified that there were currently 15 employees classified as group leaders, four of whom are paid more than Tim, who has not resided with Lesure for almost 10 years.

Haigh is 20 years old and works as a sprinkler fitter helper. He earns between $9 and $10 per hour. Lesure testified that Haigh is a relatively new hire. It appears that only one other employee currently shares this job classification and he earns $14 an hour.

Lesure testified that he believes that rank and file unit employees are aware of his familial relationship with Shawn and Tim Werner and Haigh.

Rick Mann is the Employer's vice president of service and owns 25% of the Employer. His son, Gregory Mann is employed as a plumber's helper and earns between $10 and $12 per hour. Gregory Mann most often works under Lesure's control but does occasionally work under the direction of his father. Lesure testified that Gregory is between 24 and 25 years old. Lesure did not know if Gregory lives with his father or if he is supported by his father. The Petitioner introduced no other evidence relevant to this issue. Lesure testified that he assumes that unit employees are aware that Greg is Rick Mann's son.

Harold Speith works as a CDL truck driver and has worked for the Employer for 20 years. He earns between $10 and $12 per hour. There are no other employees who perform the same work as Speith.[7] Speith is the father-in-law to William Steingass' son, William Steingass II, who has not worked for this Employer for more than a year.

For the last five or six years, Speith has lived in a separate apartment located on the residential property of William Steingass, president and 50% owner of the Employer. Lesure does not know if Speith performed work for Bill Steingass on that property. Lesure testified that he did not know if other employees were aware of Speith's living arrangements.

Lesure testified that Tim, Shawn, Haigh, Mann and Speith perform the same job duties and work in the same locations as do other employees, receive comparable rates of pay, work the same hours, under the same supervisors and receive the same benefits as other employees. Lesure testified that none of the employees at issue receives any special considerations because of any family relationship that they may have with management. They do not perform any supervisory or management functions or have any authority to adjust employee complaints or grievances.

[7] Other CDL drivers employed by the Employer also operate other types of equipment including backhoes. Speith only drives a truck.

The record reveals that all employees receive paid vacations, paid holidays and insurance. All employees get the same number of paid holidays after serving a 90 day probationary period. Employees receive the same amount of vacation time, based upon the length of time an employee has worked for this Employer. After 90 days, all employees receive health insurance. The Employer contributes a set amount into each employee's 401(k) plan. Employees may designate the amount that they themselves will contribute. The employees do not punch a time clock. Each employee completes his own time sheet which is submitted to the payroll officer.

Section 2(3) of the Act excludes "any individual employed by his parent or spouse" from the term "employee". In determining whether spouses or children are "employees" and properly excluded from a bargaining unit where the management or supervisory relative owns less than 50% interest in a corporation the Board most often examines whether the close relative of the owner or shareholder enjoys special status or receives benefits or privileges not accorded to other employees. **New Silver Palace Restaurant, 334 NLRB 290, 302 (2001)** [8]

In **NLRB v. Action Automotive, Inc., 471 U.S. 1049 (1985)** the Supreme Court found that the Board did not abuse its discretion in excluding an employee who was the wife of the president and a one-third owner of the company and an employee who was the mother of the three owners and lived with one of them. The Court ruled that the relevant considerations included whether the employee at issue resides with, or is financially dependent on, a relative who owns or manages the business and that such an employee is typically excluded from the unit. The Court noted that close relatives of management, particularly those who live with an owner or manager, are more likely to get more favorable consideration for their work concerns than other employees. The greater the family involvement in the ownership and management of the company, the more likely that the employee-relative will be viewed as aligned with

management and therefore found ineligible to vote. The Court noted that consideration must be given to whether the employee at issue received special job related benefits such as high wages or favorable working conditions but pointed out that an employee may be excluded from the unit even though he enjoys no special job related benefits if other criteria satisfy the Board that the employee's interests are aligned with management.

In **Blue Star Ready-Mix Concrete, 305 NLRB 429 (1991)** the Board held that an employee who was the grandson of a one-third owner of the company and the nephew of another one-third owner and lived in a house given to his parents by the grandfather/owner in exchange for the parents promise to care for the grandparent, was eligible to vote in the election. The Board found no evidence of special benefits accorded to the employee at issue and noted that the employee's job was not tied to any agreement to care for his grandparent. Although the employee told other employees he did not have to "do anything" because his family owned the business, the Board found this to be an "off the cuff" comment and. without more, insufficient to exclude the employee from voting in the election.

In **M.C. Decorating, Inc., 306 NLRB 816 (1991)** the Board excluded an employee who was the brother-in-law of the company's part-owner and president because, unlike other employees, he did not have to punch a time clock and unilaterally decided if he would work overtime. The Board found that his family relationships afforded him certain privileges not shared by other unit employees and, because of his special status, he did not share a sufficient community of interest with other unit employees.

Likewise, in **Luce and Son, Inc., 313 NLRB 1355 (1994)** the Board excluded the sister of the principal owner of the company because she earned more than other employees did, received full time benefits although she was a part time employee, was the only employee to

[8] See also **Cerni Motor Sales, 201 NLRB 918 (1973)**.

receive a $200 a month car allowance, was given free gas once each month, was supervised by her nephew, lived in a house owned by her sister and was paid for a week she spent caring for her sister.

In **Aurora Fast Freight, Inc., 324 NLRB 20 (1997)**, cited by the Petitioner in support of its argument to exclude the subject employees, the Board excluded the employee relative of minority shareholders of a closely held corporation without a showing of special status. In the cited case, the employee at issue lived with his father, the employer's vice president of operations and 40% owner. The employee's uncle was the employer's president and majority shareholder. The Board found that although there was no showing of special status or treatment by the employer, the employee's close relationship with related shareholders who are actively involved in managing the company and the small number of unit employees, 16, warranted his exclusion from the unit.

There is no evidence that Tim Werner, Shawn Werner, or Greg Mann receive any special treatment or enjoy any special status as a result of their familial relationship with management. I also note that Shawn and Tim Werner have not lived in Lesure's home for at least six years, long before Lesure obtained an ownership interest in the Employer. There is no evidence that Greg Mann resides with his father. These employees enjoy no special benefits nor does the record establish any other criteria to show that any of them have interests aligned with management. Accordingly, pursuant to the cases cited above, all of these employees are included in the unit.

Nathaniel Haigh's situation is somewhat different. As noted above, he is only 20 years old and resides in Lesure's house. While there is no evidence that he enjoys any special privileges, it appears that the Board's decision in **Aurora Fast Freight**, supra, requires his exclusion. The fact that the unit in this case contains approximately 57 employees while that in

Aurora was composed of 16 does not appear to be a sufficient basis to distinguish the cases. Accordingly, I shall exclude Haigh from the unit.

The record does not establish that Henry Speith enjoys any special status or receives any special treatment because he is the father-in-law of William Steingass' son, who does not work for the Employer, let alone in a management capacity. The record is devoid of any evidence to demonstrate a basis for the exclusion of this employee and I shall, therefore, include him in the unit. [9]

David Ligget

Lesure described Liggett as a plumber and "safety person". The record discloses that Liggett works regular hours as a plumber and group leader. Like other employees, his immediate supervisors are Lesure, Cuslick and Steingass.

Group leaders are responsible for "running" various jobs which includes securing materials and telling employees the areas to be worked on in a particular day. Group leaders can order supplies and materials used on a daily basis. These items are usually valued at $100. The group leader calls such orders into Lesure who actually orders the materials. No group leaders order materials directly.

Group leaders receive the same pay and benefits as do other employees. The Employer has 10 to 15 employees who may be designated as group leaders on various jobs. All group leaders share the same responsibilities. Each group leader is provided with a two way communication system so that they can be in constant contact with management.

[9] On brief, the Petitioner presented an additional argument regarding Speith's eligibility based upon "information and belief" that Speith was an agricultural laborer or domestic . Obviously, the Petitioner phrased the argument in that manner because there is no evidence to support the contentions made. In the absence of record evidence to support it, I reject the Petitioner's argument.

On most jobs, group leaders work with the tools of their trade. Liggett was the group leader on the Steubenville job. He did not work with the tools on that job because of the contract with local 495. [10]

The Petitioner contends that, by virtue of his duties as a group leader, Liggett is a supervisor within the meaning of the Act. I disagree.

Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment." The burden of proving supervisory status is on the party who alleges that it exists**. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001); California Beverage Co., 283 NLRB 328 (1987)**. The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), aff'd. in relevant part 794 f.2d 527 (9th Cir. 1986).** The question is not whether the alleged supervisor uses independent judgment in solving problems, but whether he uses independent judgment with respect to the exercise of one or more of the specific authorities listed in Section 2(11). **Alois Box Co., 326 NLRB 1177 (1998).**

In deciding whether individuals have been delegated meaningful responsibility to "responsibly direct" employees using " independent judgment" the Supreme Court in **Kentucky**

[10] Although Local 495 Business Manager Haugh offered some testimony about Liggett's job duties and responsibilities at the Steubenville job site, he admitted that he had no personal knowledge as to what Liggett did on the project.

River, supra, has suggested that the Board distinguish between directing "tasks" (nonsupervisory direction) as compared to directing "employees" (supervisory direction). In the instant case, the evidence reflects that the authority of group leaders is limited to the routine direction of tasks rather than the independent direction of employees.

Based on the above, I have concluded that the Petitioner has not met its burden of showing that the group leaders, including Liggett, are supervisors within the meaning of the Act. Their involvement in the routine direction of work does not establish that they are supervisors. **Kentucky River,** supra; **North Shore Weeklies, Inc., 317 NLRB 1128 (1995).**

The Petitioner also contends that Liggett should be excluded because he is a confidential or managerial employee.

According to Lesure, Liggett chose to get special OSHA training on his own. As a result, Liggett has a "10 hour" OSHA card which makes him a "competent person", an OSHA term that was not defined in the record. Lesure testified that the Employer is trying to get all of its employees to earn their "10 hour" card.

Liggett has been working at home, after hours, on "safety concerns". Liggett is treated as an independent contractor for that work and is paid for his time. He is supposed to outline safety issues and make recommendations about safety procedures that the Employer should follow. Lesure will effectuate Liggett's recommendations if he deems them necessary. The effectuated polices would be applied to rank and file employees. The program is in its early stages and no policies recommended by Liggett have been implemented. There is an employee safety policy which has been in effect for some time. Lesure did not know if Liggett would, ultimately, instruct employees in safety matters. That decision has not been made. In fact, Lesure has not

yet even had any meetings with Liggett to review safety concerns. Liggett has not yet presented Lesure with any written product.

Lesure testified that Liggett does not participate in the formulation or effectuation of management polices. Liggett is not involved in labor relations and does not have access to knowledge, data or records involving labor relations.

Under Board policy, confidential employees are excluded from bargaining units. A confidential employee is defined as an employee who assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management polices with regard to labor relations, or regularly substitute for employees having such duties. **Hendricks County Electric Corp., 454 U.S. 170 (1981); Ladish Co., 178 NLRB 90 (1969); Chrysler Corp., 173 NLRB 1046 (1969)**.

Those who may at some time in the future function as confidential employees but who are not doing so at the time the determination was made are not excluded from the unit on that basis. **American Radiator & Sanitary Co., 119 NLRB 1715 (1958)**

Clearly, there is no evidence in this record to establish that Liggett is a confidential employee within the Board's definition.

Managerial employees are defined as employees who have authority to formulate, determine or effectuate employer policies by expressing and making operative the decisions of their employers and those who have discretion in the performance of their jobs independent of their employer's established policies. **Tops Club, Inc., 238 NLRB 928 fn. 2 (1978)**[11]

In **NLRB v. Yeshiva University, 444 U.S. 672, 682-683 (1980)** the Supreme Court noted that managerial employees had to exercise discretion within, or even independently of, established employer policies and must be aligned with management.

The Board has noted that an employee does not acquire management status by making some decisions or exercising some judgment within established limits set by higher management. Each case must be decided based upon the degree of discretion and authority exercised by the disputed employee. **Sampson Steel & Supply, 289 NLRB 481 (1988)**

Based upon this record, there is no evidence that Liggett meets the definition of a managerial employee based on his current duties and responsibilities. Accordingly, I find that Liggett is a unit employee and eligible to vote in the election directed herein.

The Eligibility Date

As noted, the Petitioner contends that the payroll period for eligibility for the second election should be the date used in the first election. The Petitioner argues that to do otherwise would effectively disenfranchise employees as a result of the Employer's actions. The Petitioner's argument revolves around the eligibility of those employees who worked only at the Steubenville job site. Although I have already found them ineligible to vote, I will address the Petitioner's contentions regarding the eligibility date.

The Employer argues that the payroll period for eligibility should be the one immediately proceeding the issuance of this decision. I agree.

Where the Board sets aside a prior election and directs a repeat election, the eligibility period is the one immediately preceding the date of the repeat election and not the one established for the first election, absent unusual circumstances. **Wagner Electric Corp., 127 NLRB 1082 (1960); Great Atlantic & Pacific Tea Co., 121 NLRB 38 (1958)**

The Petitioner cites **Jeld-Wen of Everett, Inc., 285 NLRB 118 (1987)** in support of its position. In the cited case, the Board dealt with the issue of whether replaced strikers, eligible to vote in an initial election held within 12 months of the inception of an economic strike, should be

[11] quoting: **Bell Aerospace,219 NLRB 384 (1975)**

allowed to vote in the rerun election held outside the 12 month period where the rerun election is caused by employer misconduct. The Board determined that , in view of the legislative history of Section 9(c)(3), the 12 month limitation period for economic strikers would be applied only to the first election and that replaced economic strikers are eligible to vote in a rerun election necessitated by election misconduct.

The Petitioner did not cite any cases in which the Board extended the above-holding to situations other than economic strikers.

I note that this second election is being conducted by agreement and that no findings have been made that any of the Employer's alleged conduct during the pendency of the first election was objectionable or warranted setting aside the first election. There is no evidence to indicate that there are any unusual circumstances present in this case that would warrant a departure from the Board's standard policy of determining eligibility based on the payroll period preceding the direction of the second election.

DIRECTION OF SECOND ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees

who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by Plumbers and Pipefitters Local 219 a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the

election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 2, 2004.

DATED at Cleveland, Ohio this 19th day of March, 2004.

/s/ John Kollar
John Kollar
Acting Regional Director
National Labor Relations Board
Region 8

347-40409